

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|---|---|------------------------------|
| ZEFERINO MONTELEONE JR. |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| HY-VEE FOOD STORES, INC. |) | |
| Respondent |) | Docket Nos. 1,004,974 |
| |) | & 1,016,044 |
| AND |) | |
| |) | |
| FIDELITY & GUARANTY INS. CO. |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier request review of the July 19, 2007 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on October 9, 2007.

APPEARANCES

Mark E. Kolich of Lenexa, Kansas, appeared for respondent and its insurance carrier. Neil A. Dean, claimant's counsel, neither appeared for oral argument nor filed a brief.¹

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained a 52.5 percent work disability based upon a 60 percent wage and 45 percent task loss as well as a 5 percent functional impairment to the body as a whole.

¹ The administrative record reflects that on November 5, 2007, the ALJ issued an order allowing withdrawal claimant's counsel, Neil Dean. The record further reflects that David R. Hills has since entered his appearance as attorney for the claimant.

The respondent requests review and notes the ALJ's Award does not list Mark Lammers' deposition as part of the record nor is that testimony referred to in the body of the Award. Respondent argues that the deposition was taken within established terminal dates and requests the Board remand the case to the ALJ for consideration of that deposition testimony.²

The Claimant's counsel did not appear for oral argument. The Board had sent claimant's counsel a letter advising him of the date of the oral argument in this matter. A week before the scheduled oral argument date the Board's staff made repeated telephone calls to confirm the oral argument date and then sent an e-mail and faxed letters to the attorney to confirm the date of oral argument but did not receive a response.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the Board must address the respondent's request to remand this case to the ALJ for consideration of Mark Lammers' deposition. The deposition was taken within the established terminal dates. Because of inclement weather claimant's counsel did not appear at Mr. Lammers' deposition but the parties agreed that cross-examination could take place at a later date. And claimant's counsel notified the ALJ that an agreed extension of terminal dates would be filed. When the agreed extension was not forthcoming the ALJ proceeded to enter an award based upon the evidence that had been filed. The ALJ explained:

Procedural note. At the expiration of terminal dates, the administrative law judge's office contacted the attorneys to confirm that all evidence was in, and the claimant attorney's office said that an agreed extension of terminal dates would be forthcoming. The administrative law judge delayed issuing an award in anticipation of the terminal date extension. However, the parties never did request the extension. K.S.A. 44-523 directs the administrative law judge to issue an award within 30 days of submission of the case, and that time limit has passed. Therefore, this award was prepared based on the evidence received as of the last terminal date, that of the respondent, June 15, 2007.³

At the time the ALJ issued the Award, the evidentiary record did not contain Mark Lammers' deposition. Consequently, the ALJ did not consider the evidentiary deposition

² Mark Lammers' deposition had not been filed with the Division of Workers Compensation when the Administrative Law Judge issued the July 19, 2007 Award.

³ ALJ Award (Jul. 19, 2007) at 3.

of Mr. Lammers. The respondent argues the deposition was taken within the established terminal dates and should be considered as a part of the evidentiary record.

In a workers compensation proceeding, the claimant has the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends.⁴ The "burden of proof" is the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵ The parties stipulate to issues not in dispute and the remaining disputed issues require the presentation of evidence. All the evidence is presented to the ALJ. K.S.A. 44-523(b) provides for establishment of terminal dates for completion of the submission of evidence. After the parties have fully submitted the evidence, the ALJ issues a decision based on the record.

An ALJ is required to set terminal dates for all parties after the first full hearing on the case. Extensions of terminal dates may be granted; if all parties agree, for certain situations where a medical evaluation of the claimant is unable to be obtained before the submission of the case, or for good cause shown.⁶

The parties had agreed to reschedule Mr. Lammers' deposition and claimant's counsel had told the ALJ that an agreed extension of terminal dates would be filed. There is no explanation why claimant's counsel did not file the agreed extension of terminal dates. The ALJ cannot be faulted with proceeding to decide the case based upon the filed evidence. Although it would have been better practice for respondent's counsel to have notified the ALJ that Mr. Lammers' deposition had been taken, nonetheless, that omission can be explained by the expectation that the terminal dates would be extended as agreed.

Respondent requests the Board to remand the case for the ALJ to consider the deposition of Mark Lammers. The Board agrees the deposition was taken within established terminal dates and is part of the evidentiary record. Accordingly, this matter is remanded in order to allow the ALJ to consider that evidence.

A record may be reopened for good cause shown as provided by K.S.A. 44-523(b)(4) in order to accept additional evidence. In its brief to the Board, respondent offered an explanation of unique circumstances that could clearly form the basis for a showing of good cause to reopen the record. Claimant's new counsel may well raise additional issues to establish good cause. And at a minimum respondent does not object to reopen the case to allow cross-examination of Mark Lammers. Accordingly, in the

⁴ K.S.A. 44-501(a).

⁵ K.S.A. 2001 Supp. 44-508(g).

⁶ K.S.A. 44-523(b).

interest of justice, the Board finds that this matter should be remanded to the ALJ for a hearing to afford the parties an opportunity to fully inform the court concerning the merits of the request to reopen the record.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 19, 2007, should be set aside and this matter remanded to the Administrative Law Judge for consideration of the January 12, 2007 deposition testimony of Mark Lammers and for such further proceedings as may be reasonable or necessary including a final determination of the claim.

IT IS SO ORDERED.

Dated this 30th day of November 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David R. Hills, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Neil A. Dean, Attorney at Law, PO Box 2861, Topeka, KS 66601-2861
Kenneth J. Hursh, Administrative Law Judge